

January 3 2011

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FILED

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Re: Limited Scope Representation Rules, AF 09-0688, AF 07-0157

Montana Supreme Court Justices:

I am writing to ask the Montana Supreme Court to support the rule changes proposed. I am co-chair of the State Bar Access to Justice Committee and am a member of the sub-committee on limited scope representation that proposed the amendments to the Rules of Civil Procedure and the Rules of Professional Conduct.

I have read and completely agree with the comments submitted by Sue Talia and by Judge Russell Fagg and do not have much to add to those comments. However, I will respond briefly to the Ethics Opinion 101216 and the conclusion that ghostwriting is unethical.

The Montana Ethics Opinion takes on the ABA Formal Opinion 07-446, relied on by the sub-committee on limited scope representation. The Montana Ethics opinion quotes the ABA conclusion that receiving legal assistance behind the scenes "is not material to the merits of the litigation" and states that it disagrees.


The reasons given in the Montana Ethics Opinion are we have a small bar and know each other. It is not explained nor do I understand why that makes ghostwriting unethical. Does it mean that judges may be persuaded or dissuaded more by the lawyer's reputation authoring the pleadings than the merits of the pleadings? If such is the case, then perhaps ghostwriting will help a judge consider the merits of a case on its face without the distraction of knowing who the authoring attorney is. That a lawyer may be hiding behind anonymity should not affect the merits of the case. On the positive side, the pleadings may be stated more clearly and completely and a litigant may be better served than if she had no representation at all.

The objections based on the presumption that ghostwriting will cause chaos and more work and costs for the represented party are not well founded. These problems already occur when one party is not represented and the other is. A lawyer representing a party on a limited basis may serve to address these concerns more than exacerbate them. Further, an attorney's representation is certainly not a guarantee that the opposing party will not be required to address arguments that have no merit or draft certain orders. The Montana Ethics Opinion stated reasons do not refute the ABA's conclusion regarding ghostwriting's effect on the merits of the litigation.

The rule additions are necessary to explain how limited scope representation may be ethically conducted. The current rules give no guidance and result in too much risk for lawyers to actively seek limited scope representation as a viable part of their practice. The result is a growing population attempting to navigate through the courts on their own. The intent is not to limit the quality of representation, nor should any lower quality be tolerated. The intent is to increase representation of those parties who do not or cannot retain an attorney for full representation.

For these reasons, I respectfully request the Montana Supreme Court to adopt the proposed rule changes to the Rules of Civil Procedure and the Rules of Professional Conduct.

RESPECTFULLY SUBMITTED this 3rd day of January, 2011.


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